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# In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 607

FRANK J. ANDREWS, PETITIONER

*v.*

UNITED STATES OF AMERICA

No. 703

GUS POSTELL AND WILLARD WHITLEY, PETITIONERS

*v.*

UNITED STATES OF AMERICA

No. 706

PETER A. ANDREWS, JR., LOUIS TYE, AND FRANK D. ANDRIOLA, PETITIONERS

*v.*

UNITED STATES OF AMERICA

No. 707

WALTER OWENS AND RUSSELL A. MALONE, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

**OPINION BELOW**

The opinion of the court of appeals is reported at 347 F. 2d 207.

## JURISDICTION

The judgment of the court of appeals was filed on June 17, 1965. Timely petitions for rehearing were denied on August 30, 1965. The petition for a writ of certiorari in No. 607 was filed on September 24, 1965. In Nos. 703, 706 and 707, the time in which to file petitions for a writ of certiorari was extended by Mr. Justice Stewart to and including October 29, 1965, and the petitions were filed on or before that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

All petitioners except Frank J. Andrews (No. 607) raise the following issue:

1. Whether the evidence is sufficient to support the verdict of the jury.

All petitioners raise the following issues:

2. Whether the district court abused its discretion in refusing to allow *voir dire* examination of the jurors to determine if they had read newspaper articles regarding the progress of the trial.

3. Whether the district court erred in instructing the jury on willfulness, reasonable doubt, and the desirability of reaching a verdict.

4. Whether the district court abused its discretion in allowing the government to impeach the testimony of a witness by questioning the witness regarding his prior inconsistent grand jury testimony.

Petitioners Gus Postell and Willard Whitley (No. 703) raise the following issues:

5. Whether the district court abused its discretion in refusing to suppress evidence seized pursuant to a search warrant.

6. Whether the proof conformed to the indictment.

7. Whether the district court abused its discretion in denying severance.

## STATEMENT

1. After a trial by jury in the United States District Court for the Eastern District of Kentucky, petitioners were convicted of various offenses under a thirty-five count indictment charging conspiracy to defraud the United States, evasion of the wagering excise tax, violation of the Federal Communications Act, and willful failure to register and pay the wagering occupational tax (R. 2273a–2306a, 2378a–2385a).[1] Each petitioner was convicted on the conspiracy count and sentenced on that count to imprisonment for five years and to pay a fine of $10,000. The prison sentences on the other counts, on which fines were not imposed, run concurrently with the sentences on the conspiracy count.[2]

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[1] References are to petitioners' appendix (page number followed by "a") and the government's appendix (page number followed by "b") in the court of appeals, both of which have been filed with this Court as a part of the record.

[2] In addition to the conspiracy count, counts 2 through 32 charged all petitioners except Malone with substantive monthly evasions of the wagering excise tax from February, 1959, through August, 1961, in violation of 26 U.S.C. 7201 and 18 U.S.C. 2.

Count 33 charged all petitioners except Malone with a substantive violation of the Federal Communications Act on June 26, 1961, in violation of 47 U.S.C. 203(c)(3) and 501, and 18 U.S.C. 2.

Counts 34 and 35 charged petitioners Peter A. Andrews, Jr. and Malone with willfully failing, during the month of July, 1961, to pay the wagering occupational tax and to register,

2. The case arose out of large-scale gambling operations[3] in Newport, Kentucky, which began in February, 1959, with the formation of a partnership between petitioners Owens and Whitley and Daniel Andrews (who was named in the indictment as a co-conspirator and co-defendant, but whose trial was severed due to illness) (R. 2424a). The partnership achieved a consolidation of several formerly separate numbers operations in the Newport area (See R. 130a-136a, 139a-183a). On February 2, 1959, the Owens-Whitley-Daniel Andrews partnership filed wagering tax Forms 11-C, listing themselves and petitioner Peter Andrews, Jr., as principals (R. 149a).[4] On the same date, that partnership rented from petitioner Frank Andrews the premises at 330 Central Avenue

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in violation of 26 U.S.C. 4411 and 7203, and 26 U.S.C. 4412 and 7203, respectively.

Petitioners were convicted on the substantive counts, as follows (R. 2379a–2385a):

Andrews Counts 2–29, 33–35
Tye Counts 2–33
Andriola Counts 2–9, 33
Owens Counts 2–33
Malone Counts 34–35.

[3] All petitioners concede the existence of large-scale, open gambling activities at all pertinent times under the indictment, but dispute their individual roles (Pet. No. 607, p. 4; Pet. No. 703, p. 20; Pet. No. 706, p. 5; Pet. No. 707, p. 5).

[4] On February 9, 1959, that partnership filed a supplemental Form 11-C, dropping Peter Andrews as a principal (R. 149a). This action was apparently the result of a dispute regarding the competitive situation with respect to gambling activities in the Newport area (R. 1838a–1839a, 1841a–1844a). The evidence, however, shows that Peter Andrews later participated in the conspiracy.

in Newport, known as the old Sportsman's Club, for use as a gambling casino (R. 233a, 2425a).[4]

Thereafter, as all petitioners concede, gambling activities were openly conducted on the premises. The building in which the casino was located was purchased by the Newport Municipal Housing Commission on August 17, 1960 (R. 1311a), after negotiations with Frank Andrews (R. 1308a), and the gambling operation was moved to an adjoining location, 333–339 Central Avenue, then known as the Copa Club, and thereafter known as the new Sportsman's Club. Rental payments were by checks on the account of Owens and Daniel Andrews (R. 1322a, 1334a). The telephone in the name of Frank Andrews at the old location was moved to his private office at the new location (R. 1550a, 1551a), and other telephones in the old location belonging to the Club were removed to the new location (R. 1566a–1567a).[5] On November 1, 1960,

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[4] During the material times covered in the indictment, legal title to the old Sportsman's Club was actually in petitioner Owens' name, although petitioner Frank Andrews was the real owner of the premises (R. 1311a–1312a, 1319a, 1334a, 1400a, 1406a). Petitioner Frank Andrews' defense was based upon the theory that he was merely the landlord and had no connection with the gambling operations (347 F. 2d at 210).

[5] The telephones are of significance because they were utilized to take bets and to inform callers of the winning numbers in both the day and night operations of the casino (*e.g.*, R. 325a, 1016a, 1812a–1814a; 43b). Petitioners contended at trial and in the court of appeals that the night operations were exempt from the wagering tax because the wagers were made, winners determined, and prizes distributed on the premises with all persons placing wagers present (see 347 F. 2d at 209; 26 U.S.C. 4421(2)(A)).

Frank Andrews arranged for the installation of a burglar alarm system for the office door at the new Sportsman's Club location (R. 1678a–1683a). Entry into the casino was accomplished through a door which was always bolted, and which was adjacent to a "one-way" glass window so that those inside could observe persons seeking to enter (R. 283a). The casino contained offices, work areas, and gambling equipment of various kinds, including the telephone banks and a machine which was used to select winning numbers (see R. 268a–289a; 92b, 94b). The gambling operations were conducted from that location until they were closed down on September 7, 1961 (R. 759a, 1954a), except for the period from August 5 to August 20, 1961, when the night numbers activity shifted (apparently because of a local police raid) to the second floor of an adjacent building, the Corner Liquor Store, which was operated by Frank Andrews' nephew, petitioner Andriola (R. 308a, 541a–542a).

3. Two principal methods were employed to evade the wagering taxes: (a) gross understatement of the business done in the daytime and (b) no payment of taxes whatsoever on the night operations.

a. As to the first method, testimony by three of the five or six office girls who worked at the casino established that they extracted and "bundled" the most convenient one-quarter of the bet slips each day in order to show a total business of approximately $1,500 to $2,000, whereas the actual total was approximately $5,500 (R. 635a–648a, 677a–678a, 691a, 698a, 731a–734a, 805a–814a, 816a–819a, 870a–884a). The remain-

ing slips, which represented the three-quarters not reported, were regularly removed or otherwise disposed of (R. 691a–692a, 711a–712a, 728a, 731a–734a, 888a–889a). The "bundled" work was reported as the total business of the day operation in the returns filed by petitioners Owens and Whitley and Daniel Andrews from February, 1959, through August, 1961 (R. 50b–81b). In a hidden compartment installed in a closet by petitioner Frank Andrews (R. 1774a), agents conducting a search, pursuant to a warrant, discovered day numbers work and a cardboard carton containing various "bundled" day numbers slips (R. 394a–397a, 437a–438a, 708a–726a, 875a–883a). In conferences with agents of the Internal Revenue Service, Owens, Whitley and Daniel Andrews stated that all bet slip records prior to November, 1960, had been destroyed in a fire at the old Sportsman's Club (R. 194a, 205a–206a). Although government agents were later given some records, they were never given those records which would have shown the actual gambling business being done by the operation (R. 199a, 206a, 226a; 12b *et seq.*).

b. Despite representations to the contrary made to Internal Revenue Agents by petitioner Owens and Daniel Andrews (R. 4b–5b),[1] many of the persons participating in the night numbers game were not on the premises when the winners were declared, and telephone betting was used on a large scale to handle the wagers of absent participants (*e.g.*, R. 286a, 294a–

[1] This was in support of a claim that the operations were exempt from taxes under 26 U.S.C. 4421(2)(A).

295a, 316a–317a, 322a, 325a, 1000a–1005a, 1016a–1060a, 1101a–1110a, 1178a–1178a, 1237a; 43b, 101b–102b, 111b–112b). Petitioner Malone, who acted as master of ceremonies during the casino's night operations (R. 285a, 306a, 576a, 614a), told people they need not be present to win during the night game (R. 306a, 336a). In searches pursuant to a warrant, various night numbers tickets, numbers books, tapes, tally sheets and other records were taken from the new Sportsman's Club indicating that there were some sixty-two writers in the night numbers operation (R. 2006a). In addition, miscellaneous numbers paraphernalia was found on the second floor of the Corner Liquor Store (R. 526a–542a), and while the agents were there numerous telephone calls were received inquiring as to the "night number" (R. 558a).

## ARGUMENT

1. All petitioners except Frank Andrews (No. 607) question the sufficiency of the evidence to support their convictions. They acknowledge that large-scale gambling operations were being conducted on the premises involved (Pet. No. 703, p. 20; Pet. No. 706, p. 5; Pet. No. 707, p. 5), but contend that their various roles were other than those of conspirators. We discuss the evidence as to each petitioner separately:

a. Petitioner *Postell* admits that he applied for, and received, a wagering tax stamp as a partner with petitioner Whitley, but argues that such partnership never operated (Pet. No. 703, p. 20). He further con-

tends that he was merely the manager of the bar in the night operation (Pet. No. 703, p. 20). It is clear, however, that petitioner Postell was an equal partner with petitioner Whitley; that is, Whitley retained 50 percent of his earnings from the Owens-Whitley-Daniel Andrews partnership, and Postell received the other 50 percent of such earnings (R. 162a, 167a–168a, 205a, 2421a–2423a). Petitioner Whitley specifically stated to an agent of the Internal Revenue Service that he had a partnership with petitioner Postell to the extent of 50 percent of the net win of the day numbers, exclusive of any operating expense (R. 205a). The partnership of Postell and Whitley was confirmed by the Forms 11–C which they filed, giving their address as the old Sportman's Club (R. 2421a),[1] and by the subsequent Forms 11–C which they filed after the move, giving their business address as the new Sportsman's Club (R. 2422a–2423a).

Testimony of the office girls, moreover, established that Postell was more than a mere bar manager in the gambling operation; he actively handled the work sheets and records R. 916a–932a) and received wagers from a numbers writer (R. 1226a–1227a). Postell and Whitley received the daily consolidated sheets showing the whole day numbers operation (R. 831a–832a) and, with Daniel Andrews, they occasionally directed the work and activities of the office girls (R. 753a). Postell also helped in obtaining winning

[1] The address given on the return is 202 W. Southgate Street, but the same location was later known as 330 Central Avenue, the site of the old Sportsman's Club.

numbers (R. 1812a–1814a; 43b) and helped in looking for "hits" (R. 677a). While petitioner Postell was not directly shown to have been active at the casino during the night operations, the evidence demonstrates that the day and night operations were one and the same conspiracy.

b. Petitioner *Whitley* admits his interest in the day operation, but contends that he had no interest in the night business (Pet. No. 703, p. 20). He contends, therefore, that the evidence fails to show any intent on his part to evade or defeat the wagering tax (Pet. No. 703, p. 20). Substantial tax evasion took place during the daytime operation, however, and it is inconceivable that Whitley could have participated in the gambling operation to the extent that he did and yet be unaware of the true nature and status of the business. Whitley directed the work of the office girls (R. 635a–636a, 753a–754a), he looked for "hits" (R. 677a), he received worksheets turned over to him by employees of the enterprise (R. 631a–632a) and he maintained his partnership interest throughout the scheme's operation, as indicated by the returns filed with the Internal Revenue Service (R. 2404a–2420a; 50b–81b, 85b–88b) and his negotiations with the Newport Municipal Housing Commission regarding the rental of the new Sportman's Club (R. 1322a). Whitley's guilty knowledge of the nature of the operation is also suggested by the fact that he lied to an Internal Revenue Service agent, during the raid on the casino, about whether certain records which had been found by the agents in a concealed

compartment belonged to him or to petitioner Owens (R. 409a–410a). As in the case of petitioner Postell, it is of no significance that Whitley did not actively participate in the night operation, since the evidence as a whole clearly shows that the day and night operations were a single enterprise.

c. Petitioner *Peter Andrews* contends that he was merely a "Clerical Employee" and that as such he was not subject to the wagering tax and had no knowledge that it was not being paid (Pet. No. 706, pp. 28–29). The evidence, however, justifies the conclusion that Peter Andrews was an entrepreneur in the operation. He was originally one of the principals in the Owens-Whitley-Daniel Andrews partnership (R. 149a) and was dropped from that partnership (ostensibly, at least) because of his competitive proprietary interest at that time in other gambling activities in the Newport area (R. 1838a–1839a, 1841a–1844a). The evidence showed that he was later active in the conspiracy and received a share of the profits. He served as a cashier during the night operation (R. 1017a–1018a, 1087a–1091a), and he also received work sheets from the office girls (R. 574a), counted money, and handled various operations with bet slips (R. 274a, 277a, 284a, 288a, 304a, 342a). He worked with petitioner Malone in acting as master of ceremonies and drawing winning numbers (R. 279a, 284a, 288a, 317a, 320a, 322a). He received telephone bets (R. 357a). At the time of the raid by government agents, he and petitioner Tye ran to the ladies' restroom and there unsuccessfully attempted to hide some of the

night numbers telephone work (R. 380a–382a). A payroll compilation for writers and others involved in the night operation, which was seized by agents during the raid, was in the handwriting of Peter Andrews (R. 1986a–1990a). Other records in his handwriting, concerning the expenditures and income of the night operation, were discovered during the raid (R. 2059a–2060a, 2071a). Records of the enterprise showed that Peter Andrews' share of the "split" of the net profit over a five weeks period was 22½%, or $1417.50 (R. 1985a–1986a).

d. Petitioner *Tye* argues that he was merely a clerical employee and a night bartender (Pet. No. 706, p. 28) but records of the business indicate that he received 22½% of the profits (R. 1985a–1986a). The evidence also shows abundant activity on Tye's part in assisting Peter Andrews with the paperwork in connection with the bets slips and cash (R. 284a–304a, 307a, 339a, 380a–382a). Tye worked in the office of the club (R. 321a) and, as indicated above, ran with Peter Andrews to the ladies' room in an effort to hide certain telephone bet records when Internal Revenue Service agents raided the operation (R. 380a–382a).

e. Petitioner *Andriola* asserts that he was merely the operator of the Corner Liquor Store, and that there was no evidence which connected him with the operations of the gambling enterprise (Pet. No. 706, p. 28). The proprietary interest of petitioner Andriola in the enterprise, however, is nonetheless apparent. Andriola received 5% of the net profit of the enterprise, according to records seized during the

raid (R. 1985a–1986a).* At the time of the raid on the Corner Liquor Store, he at first lied to the agents, telling them that he knew nothing about the activity on the second floor (R. 529a), except that it was occupied by a theatrical booking office (R. 538a). Later, after the agents had discovered gambling paraphernalia on the second floor (R. 526a–542a) and confronted Andriola with the fact, he stated that there were three wagering tax stamps "up there" (R. 539a). During the raid, a number of telephone calls were received at the Corner Liquor Store inquiring about the "night number" (R. 558a).

*f.* Petitioner *Owens* admits that he was a partner in the gambling enterprise, but denies any participation in a scheme to evade the taxes (Pet. No. 707, pp. 38–39). In view of Owens' extensive proprietary interest in the operation, his assertions of ignorance were properly rejected by the jury. He participated actively in the operations of both the day and night numbers games by picking up the "bundled" work (R. 728a, 890a), hiring office girls (R. 626a), taking worksheets from the girls (R. 574a), acting as night cashier (R. 1017a–1018a), and selecting winning numbers from the machine used for that purpose (R. 1018a–1019a). His false and contradictory statements to the Internal Revenue Service agents who conducted the audit of the enterprise further tend to show guilty knowledge on his part (*e.g.*, R. 187a *et seq.*; 1b *et seq.*).

g. Petitioner *Malone* contends that he was only a customer and patron of the casino, who had no inter-

* Andriola was known by the nickname "Bud" (R. 369a, 567a), and the name "Bud" in the record in question refers to him.

est in the club and no knowledge of wagering taxes being due or unpaid (Pet. No. 707, p. 39). The evidence shows, however, that he took bets (R. 272a–273a, 286a–287a, 306a, 317a, 319a–320a, 323a, 327a, 335a–336a, 341a, 345a), using a code number for his work, just as the other writers did (R. 273a, 321a) and received a percentage of the bets he wrote. He knew that taxes were due, for when he accepted a bet from an Internal Revenue Service agent he asked for money to cover the tax (R. 308a, 325a–326a, 334a). As master of ceremonies at the night operation (R. 285a, 306a, 576a), he participated in the plan which made it appear that the betting was done on the premises (R. 285a, 296a, 316a, 322a, 362a; 93b). He told a revenue agent, however, that one did not have to be present to win (R. 306a, 336a). Thus, although there is no showing that he had a direct proprietary interest in the full scheme beyond what he earned as a writer, the evidence shows his knowing participation in the scheme to avoid paying federal taxes.

In the face of this evidence, petitioners' reliance on the case of *Ingram* v. *United States*, 360 U.S. 672, is misplaced. In *Ingram* the Court held that, as to non-proprietary employees, acts of concealment did not show knowledge of or intent to evade federal taxes since the concealment might have been merely to avoid detection by the State. Here, in contrast, all of the petitioners except Malone had a proprietary interest and there was direct evidence showing Malone's extensive connection with the whole operation and awareness of the federal tax obligation. In this

case, moreover, the gambling activities were largely open and unconcealed and the primary motive for the acts of concealment was thus not to conceal the operation generally, but to evade the federal wagering taxes due.

2. All petitioners contend that the district court abused its discretion in refusing to question the jurors during the course of the trial to determine whether they had read newspaper accounts of the progress of the trial. Because of pre-trial newspaper publicity regarding this case and petitioners' unsuccessful pre-trial motions for severance and continuance based on such publicity (R. 2331a–2334a), the district court was aware of the problems presented in this area. Consequently, it instructed potential jurors not to read newspaper articles regarding the case or listen to radio or television accounts of the case.[10] This initial instruction was repeated and emphasized at almost every recess for the lunch hour, and at each daily recess during the course of the trial which consumed eighteen days exclusive of the time spent in jury selection and deliberations (R. 147a, 234a, 267a, 309a, 353a, 402a, 482a, 547a, 653a, 751a, 837a, 1029a, 1100a, 1200a, 1295a, 1389a, 1617a–1618a, 1698a, 1822a, 1930a, 2075a, 2136a).[11]

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[10] These instructions appear in the Jury Voir Dire Transcript, not printed in the appendices filed with this Court, at pages 69–70.

[11] The following additional relevant references are to pages of the Transcript of Trial not printed in the appendices filed with this Court: Tr. 536, 550, 672, 882, 981, 1736, 2450, 2562, 2830, 3096, 3571, 3770, 3848, 3910.

On the sixth day of the trial, a newspaper article with the headlines: "United States Stopped From Showing Numbers Selection 'Rigged'" was brought to the attention of the district court, and counsel for petitioner Frank Andrews requested the district court to inquire whether any of the jurors had read the article (R. 354a–355a). The district court refused to conduct such an examination, noting that the jury had been again specifically admonished the previous day not to read any account of the trial in the newspapers and not to read any of the headlines (R. 354a–355a). The district court stated (R. 355a):

> I can't go on the assumption that they [the jurors] violate the instructions of the court, and I cannot see how the newspapers can keep from reporting this case. It is a case of public interest.

The district court went on to note that it did not intend to examine the jury every morning of the trial (R. 355a–356a).

Two days later, counsel for petitioner Frank Andrews again requested the district court to examine the jury as to whether any of them had read another article regarding the trial (R. 483a). While noting that the article contained "a rather glaring headline" (R. 483a), the district court stated that the mere fact of such newspaper coverage of the trial did not indicate that any of the jurors had violated the district courts admonitions, and remarked further (R. 484):

> * * * I am not going to have the jury catecized [*sic*] every morning before we start court

> to see whether or not they have violated their oath and violated their obligations as jurors to observe the court's instructions, simply because the newspapers are writing up this case.

Subsequent requests by petitioners for questioning of the jury in this regard were also denied on the same basis. Petitioners presented nothing in support of their requests for examination of the jury, other than the newspaper articles themselves.

In these circumstances, the trial court acted well within its discretion in refusing to interrogate the jurors. There was no reason to assume that the jurors had violated the constantly repeated admonitions of the trial court not to read the newspaper accounts of the case and the mere fact of publicity does not constitute a sufficient showing of bias and prejudice. *Estes* v. *United States*, 335 F. 2d 609 (C.A. 5), certiorari denied, 379 U.S. 964.[12]

3. All petitioners assert that the district court erred in its instructions on (a) willfulness, (b) reasonable doubt, and (c) the desirability of reaching a verdict.

a. The district court, in its main charge to the jury, repeatedly instructed that there could be a conviction only upon a finding of willfulness (R. 2190a–2191a, 2217a), intent to evade the taxes due (R. 2191a–2192a, 2217a), and knowledge that taxes were due and that the scheme's purpose was to evade them (R. 2196a, 2198a–2199a, 2217a). In supplemental instruc-

[12] There was nothing in this case which approaches the publicity involved in *Sheppard* v. *Maxwell*, 346 F. 2d 707 (C.A. 6), certiorari granted November 15, 1965 (No. 490, this Term).

tions, given in response to questions by the jury after a day and a half of deliberations, the district court reiterated such instructions on willfulness and knowledge (R. 2245a). Its subsequent refusal to give the jury further supplemental instructions on these elements was based on the fact that it had already thoroughly covered them, both in its original charge and in the supplemental instructions given (R. 2250a–2252a). The instruction "that a person is presumed to intend the natural consequences of his own deliberate acts" (R. 2191a–2192a) was given in that part of the instruction in which the judge was explaining that intent was not a material thing which could be be proved. The court explained that intent had to be judged "by the whole evidence in the case and by the actions and conduct of the defendants." Subsequently the court made it clear that the conspiracy charged had to be "an arrangement to deliberately set about to not report to the taxing authorities as the law required them to do" (R. 2198a). He told the jury that they were not concerned with the details of the operation but that the question was: "Did these defendants enter into an arrangement or an agreement to defeat the tax which was due the United States" (R. 2200a). The instructions more than adequately explained to the jurors that they must affirmatively find willful violation, knowledge of the taxes, and intent to evade before they could convict petitioners. See *United States* v. *Denton*, 336 F. 2d 785, 788 (C.A. 6); *Legatos* v. *United States*, 222 F. 2d 678, 685 (C.A. 9).

b. On reasonable doubt, the court charged (R. 2184a–2185a; emphasis supplied):

The term *reasonable doubt*, as used in this instruction, is best defined by a use of the term itself. Don't be confused by reasonable doubt. It is not an excuse not to make a verdict. It is not a shield to hide behind to keep from carrying out your responsibility as a juror. It is very easy for a person in his own mind to say, "Well, true, I have a reasonable doubt." Well, that is a rather variable thing, what is reasonable and what is unreasonable. But I think as common sense men of everyday affairs, you do understand the difference between what is reasonable and what is unreasonable, and so this term reasonable doubt means just what it says. It is a doubt based upon reason, not some inconsequential doubt that might flit through the mind of a juror, not some slight mental hesitation that might guide you in determining the less significant affairs of everyday life; but a doubt for which there is reason, such a doubt as would guide you in determining the course of action in the conduct of your ordinary everyday living; a doubt based upon reason, not some shadowy, inconsequential misgiving.

Few things are capable of proof to absolute certainty and while it is required of the law that ~~things are capable of proof to absolute certainty and while it is required of the law that~~ the United States should establish its case to the exclusion of a reasonable doubt, it does not mean that the United States should prove its case beyond all doubt. And if it were so required, it would be practically impossible for the United States to successfully carry out the prosecution of the laws. So that term reasonable doubt is used in the sense which I have undertaken here to define it to you.

Petitioners' complaints regarding the above instructions are insubstantial quibbles over the precise phrasing employed (Pet. No. 607, pp. 21–22; Pet. No. 707, pp. 26–27). The instructions were effectively phrased to make the concept meaningful to the jurors. See *Hooper* v. *United States*, 216 F. 2d 684, 689 (C.A. 10); *Bishop* v. *United States*, 107 F. 2d 297, 303 (C.A. D.C.).

c. In his initial instructions to the jury, the trial judge commented on the desirability of reaching a verdict (R. 2178a–2179a, 2185a–2187a) and, during the jury's deliberations, he expressed surprise at the length of time the jury was taking to reach a verdict (R. 2262a–2263a). No objection was made to these remarks, although there was objection to some substantive aspects of the supplemental charge (R. 2264a–2265a). Under the circumstances, petitioners' present objections come too late. Rule 30 F.R. Crim. P.

The record shows, moreover, that the remarks did not have the coercive effect petitioners now attempt to attribute to them. (Pet. No. 607, pp. 20–21; Pet. No. 706, pp. 22–23; Pet. No. 707, pp. 22–26). The questions asked by the jury, after it had deliberated on the case for some time, indicate that the jury was having difficulty with its verdict because of a misapprehension whether a verdict had to be uniform as to each count against all defendants (R. 2266a). Earlier exchanges between the jury and the trial judge show that the jury was considering the case very carefully and thoroughly, and that this was what was taking a great deal of time, rather than a general

deadlock of any kind (*e.g.* R. 2236a, 2238a, 2241a–2245a, 2248a, 2251a, 2254a, 2256a, 2264a–2266a). The foreman's remarks about not having "finished" (R. 2241a, 2254a), "[w]e're studying it" (R. 2236a), and "[w]e think we have made a lot of progress today" (R. 2254a), indicate merely that the jury was going through all of the evidence in great detail. The court sought only to clarify misunderstandings as to the jury's task.

4. On direct examination, the witness James Harris surprised the government by giving testimony substantially contradictory to that which he had given before the grand jury (R. 1653a–1654a). The district court properly allowed the government to treat the witness as hostile (R. 1654a) and impeach him by questioning him concerning his contradictory testimony. See *United States* v. *Allied Stevedoring Corp.*, 241 F. 2d 925, 932 (C.A. 2), certiorari denied, 353 U.S. 984. When confronted with a reading of this testimony, the witness invoked his privilege not to incriminate himself, and refused to testify (R. 1663a–1665a). The purpose of reading Harris' grand jury testimony was to demonstrate the contradictions and to give the witness an opportunity to recall the contradictory statements and to explain or deny them. See *Burton* v. *United States*, 175 F. 2d 960 (C.A. 5), certiorari denied, 338 U.S. 909. The jury was expressly instructed that the subject matter of the questions setting forth the answers of the witness to the grand jury were not to be considered as evidence against petitioners (R. 1662a, 1665a).

5. Petitioners Postell and Whitley alone contend that the district court abused its discretion in refusing to suppress evidence which was seized pursuant to search warrants obtained by an Internal Revenue Service agent who observed the operations of the gambling casinos during July and August, 1961 (Pet. No. 708, pp. 5–7). The affidavit for the warrant showed that on twelve separate occasions, from July 19 to August 21, 1961, agent Owens of the Internal Revenue Service observed the operations of the casinos. On each occasion, he saw a minimum of twelve numbers writers soliciting wagers, checking through their numbers books, turning stacks of bet slips and cash over to petitioner Peter Andrews and others, and conducting various operations with adding machine tapes. The agent observed that some of those individuals turning in bet slips would leave before the drawing of the winning numbers, and that after the winning numbers were drawn stacks of mimeographed announcements of such numbers would be taken from the premises by various writers. Shortly after the time set for the drawing of the winning numbers, the numerous telephones would begin ringing almost continuously, and the individuals answering the telephones would recite the winning numbers and hang up without further conversations (R. 274a–375a). The agent also set forth his knowledge of the existence of wagering stamps issued to certain individuals doing business at the place observed. There was thus ample probable cause to believe that a number of persons (including petitioners Peter Andrews

and Malone) were carrying on a wagering business without having purchased wagering tax stamps, in violation of the law, and that the instrumentalities of the violation (the various numbers books, bet slips, adding machine tapes, etc.) were on the premises for which the warrants were to be obtained (between R. 2326a–2327a).[13] See *United States* v. *Ventresca*, 380 U.S. 102.

6. Petitioners Postell and Whitley contend that the proof shows multiple conspiracies. The evidence, however, justifies the conclusion that the operations of the petitioners were interlocking parts of a single tax evasion conspiracy—albeit one with various facets and techniques. Thus, there was no variance between the indictment and the proof, much less a prejudicial variance. *Berger* v. *United States*, 295 U.S. 78, 83.

7. There was no abuse of discretion in the district court's denial of severance to petitioners Postell and Whitley, the only petitioners now raising that issue. Their claim that they were not participants in the conspiracy charged was an issue for the jury at the trial. A motion for severance is addressed to the sound discretion of the trial court and the trial court's disposition of it will not be reviewed in the absence of a showing of abuse of discretion. *Opper* v. *United States*, 348 U.S. 84.

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[13] The pages in petitioners' appendix which contain the affidavits and warrants are not properly numbered in sequence with the other pages; they have been numbered 2325b through 2325n, and are located between 2326a and 2327a of petitioners' appendix.

## CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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